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in the licensee qualifying for a lower bidding credit under this section, the licensee must seek FCC approval and reimburse the U.S. government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee, or licensee is eligible under this section (plus interest at the rate imposed for installment financing at the time the license was awarded), as a condition of the approval of such assignment, transfer, or other ownership change.

(3) The amount of payments made pursuant to paragraphs (b)(1) and (b)(2) of this section will be reduced over time as follows: A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or the difference between the bidding credit obtained by the original licensee and the bidding credit for which the post-transfer licensee is eligible); in year 3 of the license term the payment will be 75 percent; in year 4 the payment will be 50 percent; and in year 5 the payment will be 25 percent, after which there will be no assessment.

(4) If a small business that utilizes a bidding credit under this section partitions its authorization or disaggregates its spectrum to an entity not meeting the eligibility standards for the same bidding credit, the partitioning or disaggregating licensee will be subject to the provisions concerning unjust enrichment as set forth in §1.2111(e) (2) and (3) of this chapter.

[59 FR 59507, Nov. 17, 1994, as amended at 64 FR 33781, June 24, 1999]

§ 22.221 Eligibility for partitioned licenses.

If partitioned licenses are being applied for in conjunction with a license(s) to be awarded through competitive bidding procedures—

(a) The applicable procedures for filing short-form applications and for submitting upfront payments and down payments contained in this chapter shall be followed by the applicant, who must disclose as part of its short-form application all parties to agreement(s) with or among other entities to partition the license pursuant to this sec-

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tion, if won at auction (*see* 47 CFR 1.2105(a)(2)(viii));

(b) Each party to an agreement to partition the authorization must file a long-form application (FCC Form 601) for its respective, mutually agreed-upon geographic area together with the application for the remainder of the MEA or EA filed by the auction winner.

(c) If the partitioned authorization is being applied for as a partial assignment of the MEA or EA authorization following grant of the initial authorization, request for authorization for partial assignment of an authorization shall be made pursuant to §1.948 of this part.

[59 FR 59507, Nov. 17, 1994, as amended at 64 FR 33781, June 24, 1999]

§ 22.223 Definitions concerning competitive bidding process.

(a) *Scope.* The definitions in this section apply to §§22.201 through 22.227, unless otherwise specified in those sections.

(b) *Small business; consortium of small businesses.* (1) A small business is an entity that either:

(i) Together with its affiliates and controlling interests has average gross revenues that are not more than \$3 million for the preceding three years; or

(ii) Together with its affiliates and controlling interests has average gross revenues that are not more than \$15 million for the preceding three years.

(2) For purposes of determining whether an entity meets either the \$3 million or \$15 million average annual gross revenues size standard set forth in paragraph (b)(1) of this section, the gross revenues of the entity, its affiliates, and controlling interests shall be considered on a cumulative basis and aggregated.

(3) A consortium of small businesses is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a small business in paragraph (b)(1) of this section. Each individual member must establish its eligibility as a small business, as defined in

this section. Where an applicant (or licensee) is a consortium of small businesses, the gross revenues of each small business shall not be aggregated.

(4) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(c) *Gross Revenues.* Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold). Gross revenues are evidenced by audited financial statements for the relevant number of calendar or fiscal years preceding the filing of the applicant's short-form application. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

(d) *Affiliate.*—(1) *Basis for Affiliation.* An individual or entity is an affiliate of an applicant if such individual or entity:

- (i) Directly or indirectly controls or has the power to control the applicant, or
- (ii) Is directly or indirectly controlled by the applicant, or
- (iii) Is directly or indirectly controlled by a third party or parties who also control or have the power to control the applicant, or
- (iv) Has an "identity of interest" with the applicant.

(2) *Nature of control in determining affiliation.* (i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example for paragraph (d)(2)(i). An applicant owning 50 percent of the voting stock of

another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

(ii) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions if the voting stock is so widely distributed that no effective control can be established.

Example for paragraph (d)(2)(iii). In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him/her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are controlling principals of the applicant, the other entity will be deemed an affiliate of the applicant.

(3) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

(i) *Spousal affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) *Kinship affiliation.* Immediate family members will be presumed to own or control or have the power to

control interests owned or controlled by other immediate family members. In this context “immediate family member” means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father, or -mother, step-brother, or -sister, step-son, or -daughter, half-brother or -sister. This presumption may be rebutted by showing that:

- (A) The family members are estranged,
- (B) The family ties are remote, or
- (C) The family members are not closely involved with each other in business matters.

Example for paragraph (d)(3)(ii). A owns a controlling interest in Corporation X. A’s sister-in-law, B, has a controlling interest in a paging geographic area authorization application. Because A and B have a presumptive kinship affiliation, A’s interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership.*

(i) An applicant is presumed to control or have the power to control a concern if he/she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he/she owns, controls, or has the power to control less than 50 percent of the concern’s voting stock, if the block of stock he/she owns, controls, or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) *Affiliation arising under stock options, convertible debentures, and agree-*

ments to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 for paragraph (d)(5). If company B holds an option to purchase a controlling interest in company A, who holds a controlling interest in a paging geographic area authorization application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2 for paragraph (d)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds a controlling interest in a paging geographic area authorization application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3 for paragraph (d)(5). If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) *Affiliation under voting trusts.* (i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) *Affiliation through common management.* Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(10) *Affiliation under joint venture arrangements.* (i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a signifi-

cant factor in determining whether the business operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

(e) *Controlling interest.* (1) For purposes of this section, controlling interest includes individuals or entities with *de jure* and *de facto* control of the applicant. *De jure* control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. *De facto* control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant:

(i) The entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(ii) The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(iii) The entity plays an integral role in management decisions.

(2) *Calculation of certain interests.* (i) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(ii) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(iii) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(iv) Non-voting stock shall be attributed as an interest in the issuing entity.

(v) Limited partnership interests shall be attributed to limited partners and shall be calculated according to

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both the percentage of equity paid in and the percentage of distribution of profits and losses.

(vi) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(vii) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(viii) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person or its affiliate pursuant to paragraph (d) of this section has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

(A) The nature or types of services offered by such an applicant or licensee;

(B) The terms upon which such services are offered; or

(C) The prices charged for such services.

(ix) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

(A) The nature or types of services offered by such an applicant or licensee;

(B) The terms upon which such services are offered; or

(C) The prices charged for such services.

[59 FR 59507, Nov. 17, 1994, as amended at 64 FR 33781, June 24, 1999]

§ 22.225 **Certifications, disclosures, records maintenance and audits.**

(a) *Short-form applications: certifications and disclosure.* In addition to certifications and disclosures required by part 1, subpart Q, of this chapter, each applicant for a paging license which qualifies as a small business or consortium of small businesses shall append the following information as an exhibit to its FCC Form 175:

(1) The identity of the applicant's controlling interests and affiliates, and, if a consortium of small businesses, the members of the joint venture; and

(2) The applicant's gross revenues, computed in accordance with § 22.223.

(b) *Long form applications: certifications and disclosure.* Each applicant submitting a long-form application for a paging geographic area authorization and qualifying as a small business shall, in an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with § 22.223, for each of the following: the applicant, the applicant's affiliates, the applicant's controlling interests, and, if a consortium of small businesses, the members of the joint venture;

(2) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under §§ 22.217 through 22.223, including the establishment of *de facto* and *de jure* control; such agreements and instruments include, but are not limited to, articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements, including letters of intent, oral or written; and

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights